in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

No. 74-430

MODERN AIR TRANSPORT, INC.

Petitioner

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT NO. 145

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Respondent accepts the Petitioner's representations as to "Opinions Below" as true and accurate and all references to the Petitioner's Appendix shall be indicated by the abbreviation "App."

QUESTION PRESENTED

The Respondent respectfully rephrases the Petitioner's question presented as follows:

Whether an arbitrator's interpretation of an ambiguous scope clause of a collective bargaining agreement creates a substantial federal question, thereby invoking the certiorari jurisdiction of this Court?

STATEMENT OF THE CASE

The facts upon which the arbitrator based his decision and award are succinctly set forth in the Court of Appeal's decision and opinion as follows:

> "In 1971 Modern Air contracted out some modification and repair work to an outside agency rather than assigning the work to its own facilities. The Union contended that the contracting-out violated the collective bargaining agreement. They sought reinstatement and back pay for laid-off mechanics. Modern Air and the Union duly submitted the grievance to arbitration under the procedure provided in the collective bargaining agreement. The arbitrator found that Modern Air had breached the contracting-out provision of the agreement, and he ordered back pay and

reinstatement for those employees improperly laid off.

In respect to contracting-out, the agreement provided:

(a) All work normally performed in the Company's Maintenance Shops and facilities and airport stations by the employees covered by this Agreement is recognized as coming within the jurisdiction of the International Brotherhood of Teamsters and is covered by this Agreement. When aircraft is placed in the active service of the Company, the periodic maintenance on such aircraft shall be within the scope of this Agreement.

The parties agree that the Company may:

1. Continue to contract out work heretofore customarily contracted out.*

Initial modification of newly acquired airplanes and jet engine repair work were the subjects of

*It further provided:

2. Return equipment, parts or assemblies to the manufacturer or to an approved agency for repair or replacement.

3. Purchase necessary parts, equipment or facilities.

4. Contract out any work when the Company's facilities or personnel are not sufficient or available, or where employees available do not have the experience and ability to satisfactorily perform the work required, provided that the above does not result in a reduction in force of the employees covered by this Agreement. In which case representatives of the Company and Union will meet without delay and negotiate the proper provisions for the protection of employees' seniority and other property rights.

the Union's grievances. On the evidence submitted to him, the arbitrator found that Modern Air had contracted out the bulk of the initial modification work but that the bargaining unit employees had performed some of that work. As to the jet engine repair, he found that the amount of contracting-out had varied over the years according to Modern Air's facilities and other contingencies but, although it had contracted out much of the engine repair, it also had performed a significant amount of the work in its own facilities." (495 F.2d at 1292, App.1A-4A)

The Court of Appeals concluded that the arbitrator properly performed his function of interpreting an ambiguous collective bargaining agreement provision.

"Analyzing the arbitrator's reasoning, he performed the traditional function of one delegated to resolve contractual disputes. He interpreted and gave meaning (exclusively) to an ambiguous (customarily) contract term in light of the other provisions and purposes of the contract. His award was well founded in the 'essence' of, and more than 'rationally inferable' from the letter and purpose of, the collective bargaining agreement. **United Steelworkers v. United States Gypsum Co.**, 492 F.2d 713 (5th Cir. 1974); **Amalgamated Meat Cutters, Local 540 v. Neuhoff Bros. Packers, Inc.**, 481 F.2d 817 (5th Cir. 1973). Neither the district court nor we have any 'business overruling him because [our] interpretation of the contract is different from his.' **Enterprise, supra.**" (495 F.2d at 1245, App. 12A)

ARGUMENT

I.

THERE IS NO CONFLICT OF DECISION

While the Petitioner seeks to have this Court review the decision below, it is manifestly clear that there is no substantial federal question presented, nor has the decision below created conflict with the decisions of other Courts of Appeal. Petitioner has not demonstrated or established whereby the decision below has deviated or departed from federal case law established by this Court, but rather has resubmitted the exact same arguments that have been previously rejected by the Court of Appeal below, the District Court and the arbitrator.

One clear example cannot be avoided. Petitioner argues on page 13 of its brief that "there is no ambiguity in the instant award." Clearly, it is not the ambiguity in the award which controls, but the obvious ambiguity in the scope clause of the collective bargaining agreement which was resolved by the arbitrator that is the issue here. The decision of the Fifth Circuit clearly demonstrates that the arbitrator's interpretation of the contract was what both parties called for and what both parties received.

Moreover, the cases cited by Petitioner do not conflict with the decision below. Nowhere in the cases cited do we have an ambiguous clause. In **Local 342 UAW v. T.R.W., Inc.**, 402 F.2d 727 (6th Cir. 1968), the appellate court, in discussing the contract, stated:

> "We consider that the company's contract with the union, of which all the individuals were members, gave it a clear right to do what it did. The language of this contract was not ambiguous nor did any of its terms require interpretation by the arbitrator or the courts." **TRW, supra,** at 729.

TRW, supra, involved a discharge. In another discharge case cited by Petitioner, **Amanda Bent Bolt Co., v. UAW**, 451 F.2d 1277 (6th Cir. 1971), the collective bargaining agreement contained an unambiguous no strike clause which was violated and cannot be in conflict with the instant case. **Truck Drivers and Helpers Union Local 784 v. Ulry-Talbert Co.,** 330 F.2d 562 (8th Cir. 1964), cited by the Petitioner, is also a discharge case whereby the arbitrator was to determine the facts of the discharge and not the penalty. This case is clearly not applicable here.

Again, in **A. K. Porter v. United Saw Workers**, 333 F.2d 596 (3rd Cir. 1964), the arbitrator deviated in his interpretation of a clear and unambiguous eligibility clause. The Eighth Circuit stated, at 333 F.2d, 596, 602:

> "We find that in Part 2 of the award the Arbitrator had no ground upon which to base his interpretation of the clear and unambiguous words of the eligibility clause. Standing by itself, it gave him no room to construe it in any manner than according to its plain meaning. Bereft of any practice evidencing a relaxation of the requirement of years of total service and relying only upon age, the Arbitrator was unjustified in deviating from the plain mandate of the eligi-

bility clause as it concerned those who fulfilled only the portion making the age of sixty-five a requirement. Indeed such an interpretation neither goes to the essence nor to the application of the collective bargaining agreement." **Porter, supra.**

In **Torrington Company v. Metal Products Workers Union Local 1645,** 362 F.2d 677 (2nd Cir. 1966), the Second Circuit held that the arbitrator exceeded his jurisdiction by implying a past practice into a new agreement and overturned the award. However, this holding cannot be anything but inapposite to the case at bar, since failure to secure the election day pay by the union as a provision in the collective bargaining agreement after negotiations precludes the arbitrator from adding it to the agreement. In the case at bar, the Fifth Circuit also examined the arbitrator's role in interpreting the collective bargaining agreement and concluded that he interpreted and gave meaning to an ambiguous section of the contract. There was no ambiguity in **Torrington, supra.** The contract simply did not provide for election day pay.

Timken Co. v. Local Union No. 1125 United Steelworkers of America, 482 F.2d 1012 (6th Cir. 1973), cited by the Petitioner, also clearly delineates the differences between the case at bar and those cited by the Petitioner. In **Timken, supra,** the terms of the contract were clearly defined within the contract and the arbitrator amended the contract to substitute a contrary meaning to that defined by the parties. No such definitions appear in the scope clause in the instant collective bargaining agreement, where the arbitrator's interpretation was called for by the parties.

In **Textron, Inc. v. Auto Workers Local 516,** 86 LRRM 3240 (2nd Cir. 1974), the arbitrator's award was incomplete, ambiguous and contradictory, unlike the case at bar where the award was clear and unambiguous but unacceptable to the Petitioner.

Thus, the cases cited by the Petitioner are not in conflict with the Fifth Circuit decision below, nor has it raised a substantial federal question whereby this Court should grant certiorari.

II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Contrary to the Petitioner's position, the Fifth Circuit approved the arbitrator's award as arising out of the "essence" of the collective bargaining agreement and more than "rationally inferrable" from the collective bargaining agreement. Therefore, the Petitioner's argument that the decision below is a mere rubber stamp of the arbitrator's award does not conform to what the Fifth Circuit did.

CONCLUSION

Based upon the foregoing argument and citation of authority, it is respectfully urged that the Court deny the instant petition.

Respectfully submitted,

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By: /s/ Harold Mendelow
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 14 day of November, 1974, caused the foregoing Brief of Respondent to be served upon the following individuals, by causing three copies for each such party to be deposited in the United States Mail, postage prepaid: Erwin N. Griswold, Esquire, Solicitor General, Department of Justice, Washington, D. C., 20530; William F. Kaspers, 3500 First National Bank Tower, Atlanta, Georgia, 30303; and John Bacheller, Jr., 3500 First National Bank Tower, Atlanta, Georgia, 30303.

/s/ Harold Mendelow
HAROLD MENDELOW